

FAIR POLITICAL PRACTICES COMMISSION

Memorandum

To: Chairman Getman and Commissioners Downey, Knox, Scott and Swanson

From: C. Scott Tocher, Commission Counsel Legal Division
Luisa Menchaca, General Counsel

Re: Adoption of Regulations Implementing Sections 85304 (Legal Defense Fund) and 85700 (Donor Information/Contribution Return); Proposed Regulations 18530.4, 18570

Date: August 28, 2001

This memorandum serves to guide the Commission in its adoption consideration of proposed regulations concerning two Government Code provisions recently enacted by Proposition 34. At its July 9, 2001, meeting, the Commission considered draft language in a pre-notice discussion of Regulations 18530.4 (Legal Defense Funds) and 18570 (Return of Contributions/Donor Information).¹ At that meeting, the Commission gave staff guidance regarding the final versions for adoption. Where appropriate, the Commission's prior decisions are summarized briefly by way of background. With the exception of a very minor change, the attached draft regulations are identical to the drafts sent to the Office of Administrative Law for adoption-notice purposes.

1. SECTION 85304² – LEGAL DEFENSE FUND

Overview

Section 85304 provides:

"(a) A candidate for elective state office or an elected state officer may establish a separate account to defray attorney's fees and other related legal costs incurred for the candidate's or officer's legal defense if the candidate or officer is subject to one or more civil or criminal proceedings or administrative proceedings arising directly out of the conduct of an election campaign, the electoral process, or the performance of the officer's governmental activities and duties.

¹ The Commission, following a staff recommendation, elected not to pursue a regulation interpreting Section 85308, contributions from minors. The Commission will recall that input from the regulated community indicated the need for a regulation is minimal.

² All statutory references are to the Government Code unless specified otherwise.

These funds may be used only to defray those attorney fees and other related legal costs.

"(b) A candidate may receive contributions to this account that are not subject to the contribution limits set forth in this article. However, all contributions shall be reported in a manner prescribed by the commission.

"(c) Once the legal dispute is resolved, the candidate shall dispose of any funds remaining after all expenses associated with the dispute are discharged for one or more of the purposes set forth in paragraphs (1) to (5), inclusive, of subdivision (b) of Section 89519."

Section 85304 provides in subdivision (a) that a candidate for elective state office or an elected state officer *may* establish a separate account, not subject to the contribution limits established by Proposition 34, to raise funds to pay legal costs associated with the conduct of a statewide election campaign or legal costs associated with that person's official duties. The language is permissive, such that a candidate is not required to establish a separate account for legal defense funds. Rather, a candidate may choose instead to use his or her campaign funds to defray such legal costs, consistent with Section 89514.³ If, however, he or she wishes to raise funds in excess of the contribution limits imposed on campaign funds, subdivision (b) provides the candidate or officer may do so if he or she establishes such an account under this section. Once the legal dispute resolves, any funds in excess of legal costs may be disposed of in the same manner as surplus campaign funds. (Subd. (c).)

July 9, 2001, Commission Meeting:

Regulation 18530.4

In July, the Commission made most of the decisions about the regulation, except for subdivision (f). Specifically, the Commission decided a candidate or officeholder should establish a separate committee, apart from the campaign committee, to collect and disburse legal defense funds. (Regulation 18530.4, subd. (a).) The Commission also decided a candidate or committee shall not be allowed to establish a separate legal defense fund for each different civil, criminal or administrative proceedings. (*Id.*)

³ **"89514. Use of Campaign Funds for Attorney's Fees.**

"Expenditures of campaign funds for attorney's fees and other costs in connection with administrative, civil, or criminal litigation are not directly related to a political, legislative, or governmental purpose except where the litigation is directly related to activities of a committee that are consistent with its primary objectives or arises directly out of a committee's activities or out of a candidate's or elected officer's activities, duties, or status as a candidate or elected officer, including, but not limited to, an action to enjoin defamation, defense of an action to enjoin defamation, defense of an action brought for a violation of state or local campaign, disclosure, or election laws, and an action arising from an election contest or recount."

(Instead, only one fund shall be created for any and all proceedings.) The regulation now requires such legal defense committees to file quarterly campaign statements. (Subd. (b).) The Commission codified its holding in *In re Pelham*, O-00-274, (in subdivision (d)) and limited the amount of money that can be raised as that reasonably necessary to cover the costs of defense in the legal proceeding (subdivision (e)). Also, the Commission ensured that legal defense funds, not subject to contribution limitations, do not inadvertently become a loophole around those limitations. (Subd. (f).)

Current Draft of Regulation 18530.4 with Optional Language:

With regard to funds existing after conclusion of the underlying legal matter, the statute allows transfer to other campaign accounts. The Commission also is asked to decide how and under what strictures that transfer may occur.

Subdivision (f):

Decision 1: Section 85304 allows use of excess legal defense funds in the same manner as surplus campaign funds - specifically, subdivisions (b)(1) through (5) of Section 89519.⁴ (See footnote 4, *supra*.) Subdivision (b)(1) allows surplus funds to be used for "payment of outstanding campaign debts or elected officer's expenses." (§ 89519, subd. (b)(1).) Section 85304, subdivision (a), however, is clear that funds may be raised in excess of contribution limits only to "defray" costs associated with legal defense. The last subdivision of the draft regulation harmonizes the two statutes and forecloses a potential loophole whereby unlimited contributions could be funneled back into a campaign bank account. Accordingly, the language in "**option 'A'**" limits transfer to the amounts otherwise applicable to campaign contributions and requires those funds be attributed pursuant the provisions of Section 85306. "**Option 'B'**" allows transfer but requires more stringent attribution.

Option "A" arguably is less confusing, insofar as the method and requirements associated with transfers are already provided for in Section 85306, to which option "a" refers. The Commission, also, is in the process of adopting a regulation that interprets that statute and provides the method for compliance in transfers between candidate-

⁴ The subdivisions of 89519 provide:

"(b) Surplus campaign funds shall be used only for the following purposes:

"(1) The payment of outstanding campaign debts or elected officer's expenses.

"(2) The repayment of contributions.

"(3) Donations to any bona fide charitable, educational, civic, religious, or similar tax-exempt, nonprofit organization, where no substantial part of the proceeds will have a material financial effect on the former candidate or elected officer, any member of his or her immediate family, or his or her campaign treasurer.

"(4) Contributions to a political party committee, provided the campaign funds are not used to support or oppose candidates for elective office. However, the campaign funds may be used by a political party committee to conduct partisan voter registration, partisan get-out-the-vote activities, and slate mailers as that term is defined in Section 82048.3.

"(5) Contributions to support or oppose any candidate for federal office, any candidate for elective office in a state other than California, or any ballot measure."

controlled accounts. Option "B," on the other hand, while arguably stricter may need to be brought back to the Commission for further consideration to describe the procedure for contribution to "actual" contributors in "actual" amounts. This may mean, in fact, not a system of actual proportion (impossible if there have been expenditures from the transferring committee) but perhaps a system of proportional attribution, whereby each contributor is attributed some amount based on the size of their original contribution and the amount of funds transferred.

Staff recommends the Commission select **option "A,"** which provides necessary protection from avoidance of contribution limits and provides for a practical method of accounting that is also consistent with other provisions relating to transfers. Staff further recommends the Commission **adopt the regulation.** As experience dictates, staff may come back to the Commission to tailor the regulation differently to address particular issues that arise with implementation of the statute.

2. SECTION 85700 – RETURN OF CONTRIBUTIONS LACKING DONOR INFORMATION

Overview

Section 85700 governs the return of contributions under certain circumstances:

"A candidate or committee shall return within 60 days any contribution of one hundred dollars (\$100) or more for which the candidate or committee does not have on file in the records of the candidate or committee the name, address, occupation, and employer of the contributor."

July Commission Meeting Decisions :

To implement this statute, the Commission specified in subdivision (a) of proposed Regulation 18570 when the 60-day period begins to run. In subdivision (b), the Commission decided that a candidate or committee might deposit a contribution pending collection of the necessary donor information. In subdivision (c), the Commission decided when the contribution is deemed returned and when the funds should be forwarded to the state treasury if the donor cannot be located. To aid the record-keeping process, recipients must record the date the donor supplies the missing information. (Subd. (d).)

Modified Language:

Subdivision (e):

To give the statute meaningful effect, the Commission decided in subdivision (e) to require amended campaign statements be filed to include donor information omitted because the information was not received by the time the report was due. The Commission chose to allow 70 days after the closing date of the reporting period to

amend the report. The Commission directed staff, however, to draft the final language of the regulation so that unnecessary amendments are not filed. Accordingly, the last sentence of the regulation excepts from the amendment requirements *of this regulation*⁵ certain late contribution reports (84203), late independent expenditure reports (84204), online disclosure statements (85309 and 85500). These reports are exempted because the complete donor information will appear on subsequent reports that the committee already is required to file.⁶

Staff recommends the Commission **adopt** the attached regulation, 18570.

Attachments:

Regulation 18530.4

Regulation 18570

⁵ If the committee must file an amendment pursuant to some other statute or obligation, this regulation will not relieve that burden.

⁶ The first sentence of subdivision (e) has been modified slightly from the version sent to the Office of Administrative Law (for notice purposes). The change is a non-substantive, grammatical change.